

In the United States Bankruptcy Court
for the

Southern District of Georgia

Brunswick Division

FILED

at 4 O'clock & 00 min P M
Date 3-29-96

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

In the matter of:

FIRST AMERICAN HEALTH
CARE OF GEORGIA, INC.
and its wholly owned subsidiaries
listed on Exhibit "A"

Debtors

Chapter 11 Cases

Numbers 96-20188
through 96-20218

ORDER ON APPLICATION AUTHORIZING EMPLOYMENT OF
ALSTON & BIRD AS SPECIAL COUNSEL

Debtor's case was filed February 21, 1996. On March 1, 1996, Debtor filed an application seeking authorization to employ the law firm of Alston & Bird as special counsel to perform legal services enumerated as follows:

- (1) providing continuing and ongoing representation to the Parent with respect to the criminal proceedings;
- (2) representing Debtors in matters relating to Medicare and private pay reimbursement issues, including the Complaint for Turnover filed on the Petition Date; and
- (3) matters related to the foregoing as they relate to Debtors obligations under the Bankruptcy Code, the merger agreement with Integrated Health Services, Inc., and the plan of reorganization that the Debtors

intend to file, and similar bankruptcy related matters, as such may arise during the pendency of the bankruptcy case.

The Court scheduled a hearing for March 27, 1996, to consider that application. On March 19, 1996, an objection to the application was filed by the United States Trustee. At the hearing it was revealed that the aspect of the application relating to the appointment of Alston & Bird to serve as special counsel with respect to ongoing criminal proceedings in which the Debtor is involved was of critical urgency because the Debtor's counsel had been served with a preliminary report of the Office of Probation of the United States, forwarded to them in anticipation of a sentencing hearing in the criminal case involving the Debtor corporation which will occur in approximately three weeks. Accordingly, this order will be limited to the question of the appointment of Alston & Bird to serve as counsel in the ongoing criminal proceeding.

Debtor's application as supplemented by the statements in place by Alston & Bird's counsel, Mr. LaFiandra, reveal that Alston & Bird was retained in the fall of 1995 to represent the Debtor in regard to a multi-count indictment for alleged Medicare fraud. On November 29, 1995, Alston & Bird was paid a \$200,000.00 retainer in reference to this representation. The agreement between Alston & Bird

and the Debtor provided that Alston & Bird would bill the Debtor monthly, would be paid on a current basis for fees incurred and expenses advanced and would hold the retainer to secure its ultimate payment of those sums. In fact, on December 11, 1995, and January 11, 1996, Alston & Bird rendered bills to the Debtor which were paid in a period of 30 days or less which totalled \$44,648.00 and \$161,504.50 respectively. Notwithstanding these billings the application reveals that "Debtors owed Alston & Bird approximately \$474,286.00 as of the petition date for outstanding legal fees and expenses (before application of any retainer)." In other words, Alston & Bird holds a net pre-petition claim of approximately \$274,286.00 for its work on behalf of the Debtor in the criminal case. The application also reveals that an additional retainer of \$140,000.00 was paid Alston & Bird in consideration of its agreement to handle certain civil litigation against the United States Department of Health and Human Services. That retainer will be considered as part of this Court's ruling on the application to utilize Alston & Bird in that civil litigation and is not material to the decision herein.

The application was accompanied by an affidavit of John C. Weitnauer, a partner in the firm of Alston & Bird, outlining the pre-petition balance and the retainer and fees for which payment was made as outlined above and further contained the following language:

I, the Firm, and certain of its partners, counsel and associates may have in the past represented, and may presently and in the future likely will represent, creditors of the Debtors in matters unrelated to the matters on which Debtors seek to employ the Firm in this case.

The objection of the United States Trustee asserts that 11 U.S.C. Section 327(a) of the Bankruptcy Code prohibits the Debtors from employing professionals who are not "disinterested" and that Alston & Bird is not "disinterested" under the definition set out in 11 U.S.C. Section 101(14) of the Bankruptcy Code because the firm is a creditor in this Chapter 11 case. 11 U.S.C. Section 327(a) provides as follows:

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

The requirement that general counsel be "disinterested" incorporates the provisions of 11 U.S.C. Section 101(14) and prohibits the employment or appointment of a non-disinterested person, which includes a creditor of the debtor. The applicant contends that the employment for which it is seeking approval is sought not under 11 U.S.C.

Section 327(a), but under 11 U.S.C. Section 327(e) which reads as follows:

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

It is important to note that if the attorney's services qualify under Section 327(e), an attorney may be employed as special counsel even if that attorney has previously represented and is owed money by the debtor (1) if it is in the best interest of the estate and (2) if such attorney does not represent or hold any interest adverse to the debtor or the estate with respect to the matter on which such attorney is to be employed. There is no additional requirement, however, that the attorney be disinterested, as there is under Section 327(a), which governs the appointment of professionals who are not appointed for a specified special purpose.

Because I find the scope of representation here is limited to representation of the Debtor corporation in a criminal matter, I hold that all that is required of Alston & Bird is that it satisfy the elements of Section 327(e). I find that

it has done so.

First, this appointment is in the best interest of the estate. It is clear, following the conviction of the Debtor corporation, that the potential of a substantial monetary fine being imposed in connection with the sentencing hearing exists. The involvement of able and experienced counsel thoroughly familiar with the case is clearly in the best interest of the estate. Only through involvement of such counsel can the magnitude of the possible criminal fine be held to a minimum. In the event Alston & Bird were not appointed, Debtor would be deprived of knowledgeable counsel at a critical stage in these proceedings which could clearly result in a less favorable outcome. To the extent that the criminal fine increases, the estate is diminished. I therefore conclude that it is in the best interest of the estate for this application to be approved.

Second, Alston & Bird does not hold or represent an interest adverse to the estate in respect to this limited representation. While the affidavit of Mr. Weitnauer makes it clear that Alston & Bird may represent creditors of the Debtor, that representation is "in matters unrelated to the matters on which Debtors seek to employ the Firm in this case." It should be self-evident that any representation by Alston & Bird of a creditor, a civil question, is unrelated to Alston & Bird's

representation of the Debtor in the criminal matter. Moreover, while Alston & Bird may hold or represent an interest adverse to the estate in its possible role as counsel to a creditor, that role is not adverse to the interest of the Debtor or the estate in reducing its liability for a criminal fine. Thus both elements of Section 327(e) are met.

Finally, the Court raised the issue as to whether it was appropriate for estate funds to be utilized for the representation of the Debtor corporation in a criminal proceeding. It was not clear at the time whether Alston & Bird was representing Debtor's principals, Mr. and Mrs. Mills, who were also convicted on several counts of Medicare fraud, or whether Alston & Bird's representation of the corporation would indirectly benefit Mr. and Mrs. Mills personally. Upon further examination, it is now clear that Mr. and Mrs. Mills are personally represented in the criminal proceedings by other counsel; that none of the services rendered or to be rendered by Alston & Bird to the corporation represent *defacto* representation of Mr. and Mrs. Mills and the defense strategies of the corporation and Mr. and Mrs. Mills are not identical. Based on this information and these representations of counsel, I conclude that any compensation awarded Alston & Bird for criminal representation of the corporate defendant in the criminal case is not for the personal benefit of the individual principals of the Debtor. In the case of In re Warner, 141 B.R. 762, 764 (M.D.Fla. 1992), the Court held that "there is no specific distinction in the statute

made for the employment of criminal defense counsel. The bankruptcy court may authorize the employment of defense counsel if the criteria of either Section 327(a) or Section 327(e) are met, i.e., if the employment of defense counsel either assists the debtor-in-possession in carrying out his duties under Chapter 11 or is in the best interest of the estate" (citations omitted). As set forth above, I conclude that Alston & Bird's employment as criminal defense counsel is in the best interest of the estate, is not a disguised method of financing criminal defense costs of individual non-debtors, Mr. and Mrs. Mills, and is therefore approved.¹



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 29th day of March, 1996.

¹ Inasmuch as no evidence exists to establish that the proposed hourly rates of counsel fall within the parameters of a lodestar or prevailing market rate, that issue will be reserved until consideration of the fee application. See In re River Landings, Inc., 180 B.R. 701 (Bankr. S.D.Ga. 1995).